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Disclaimer: this submission is not intended to be legal advice

Dear Treasury

Submission: External Conduct Standards for Charities with the Australian Charities and Not-for-Profits Commission

Thank you for the opportunity to provide a written submission in relation to the external conduct standards for charities registered with the Australian Charities and Not-for-Profits Commission (**ACNC**).

1. Professional background

I head up the Sydney Charity and Not-for-profit team at Mills Oakley, an Australian national law firm offering legal services across a range of key commercial practice areas.

I have over 20 years' experience in acting for numerous charities, religious and not-for-profit organisations. I sit on a number of boards and committees including the ACNC Professional User Group, Eric Dare Foundation, and the NSW Cemeteries & Crematoria NSW Community and Consumer Consultative Group.

I have written several academic works, including a chapter within 'Charity Law' (2012, 2016 and 2018), published by Thompson Reuters. I edit the Clubs & Societies title in the Australian Encyclopaedia of Forms and Precedents, and the Community Care and Service modules in the LexisNexis Regulatory Compliance online register, both of which have a strong governance focus.

I often present seminars to executives and directors of not-for-profits and charities, including at the following events:

- Better Boards Conference;
- Associations Forum CEO & Chair Symposium;
- Associations Forum National Conference; and
- Australasian Society of Association Executives Conference & Exhibition.

My team at Mills Oakley regularly assists clients on governance issues, and frequently advises organisations on ATO and ACNC endorsements, constitutions, mergers, structural issues and social enterprises.

Additionally, my team organises board workshops and breakfast seminars, aimed at both new and more experienced directors. At these sessions, directors are taught skills in good governance and risk protection at board level, and are given a 'board guide', which is a comprehensive resource we have published for boards and committees in order to comply with their governance requirements.

2. Summary

2.1 Overview

In summary, this submission aims to emphasise the following points:

- The external conduct standards will impose an administrative burden on charities to develop policies and procedures. The ACNC should make available template policy documents and further information which addresses the requirements of the external conduct standards.
- The ACNC should provide clarity regarding the extent of standard 2. It is unclear what steps, if any, a charity must take to enforce an agreement with an overseas partner in the case of non-compliance, and if these steps are to apply to third parties other than a charity's direct partners.
- The ACNC should provide clarity around how the external conduct standards operate with the ACFID Code, and whether compliance with the ACFID Code would be sufficient to meet the obligations in the external conduct standards.
- The external conduct standards do not distinguish between the level of requirements appropriate for the different types and circumstances of overseas activities carried out by a charity. The ACNC should consider the nature of the activities of the organisation when deciding what is 'reasonable' for the organisation.
- Standard 2 of the external conduct standards provides examples of the information that might be collected by the ACNC. It is unclear from these examples the level of detail which will be required by the ACNC. Accordingly, the ACNC should produce a draft AIS for consideration by the charities.
- The new information collected in the AIS has potential to cause reputational loss to charities. It would be appropriate for the ACNC to censor some of the information which is available to the public through the AIS.
- The external conduct standards will apply to basic religious charities which will impose an administrative burden on this particular type of charity. This is because basic religious charities are not required to comply with governance standards or to report any financial information to the ACNC. A transitional arrangement may be required for basic religious charities regarding the new *ACNC Amendment Regulations (No. 2) 2018 (Cth)* (**Regulation**).
- The external conduct standards require charities to carry out significant due diligence on any organisations it collaborates with overseas. The ACNC should provide guidance on the level of due diligence which will be required to meet the obligations imposed by the external conduct standards.
- There may be some confusion about the extent of standard 4, especially with respect to the notification of local authorities. The ACNC should provide further guidance on standard 4 in the explanatory materials for the Regulation.

- If there is insufficient time to produce the further guidance referred to in this submission, then it may be appropriate to postpone the commencement of the Regulation to a later date than is now proposed.

3. Submission

For the purpose of this submission, I will discuss each proposed external conduct standard, and the issues and recommendations in turn.

3.1 Standard 1: Activities and Control of Resources

This standard provides that a registered charity must maintain reasonable internal controls around its resources. The registered charity must take reasonable steps to ensure that resources given to third parties are used in a way that is consistent with its purpose and character as a not-for-profit entity, and with reasonable controls and risk management processes in place. This standard requires the entity to comply with Australian laws relating to money laundering, financing of terrorism, sexual offences against children, slavery, trafficking of people, international sanctions, taxation and bribery.

This standard is important as it will promote greater confidence in the not-for-profit sector across the community and the general public. However, this standard will place an administrative burden on charities to develop policies and procedures to manage risks associated with its operations and dealings with third parties.

Many charities may not have policies in operation which deal with these risks, or the charities may have policies in place, but they are currently not sufficient to meet the standard. Adding to this burden is that charities rely on government funding and donations, so the entity might not have sufficient financial resources to allocate to a policies and procedures overhaul. Further, the charities may not have an employee or volunteer who has the skills to write or amend the policy documents.

We particularly question the practicality of the proposed change for basic religious charities. As they are not currently required to comply with governance standards or report any financial information to the ACNC, a transitional arrangement may be required for basic religious charities regarding the new Regulation.

In light of the above, it would be useful for many charities if the ACNC made available through its website various template policy documents which address the external conduct standards. This would also aid charities with their understanding of 'reasonable steps' and 'reasonable procedures'.

Further, while it is expected that charities will have written agreements in place with any overseas partners, it is uncommon for charities and not-for-profits to have the resources to litigate over non-compliance. This will especially be the case if the litigation is to occur in an overseas jurisdiction as this may require extensive financial resources. Therefore, we suggest that clarity should be given to whether a charity must take steps to enforce an agreement in order to comply with this standard, and if so, what steps should be taken.

We also query whether a charity must, under this standard, only take steps regarding third parties with which it directly contracts (or whether the third party's sub-contractors are also included).

The external conduct standards aim to provide a minimum level of assurance that registered charities meet appropriate standards of governance and behaviour when operating outside Australia. Arguably, the Australia Council for Internal Development Code of Conduct (**ACFID Code**) requires differing standards than those imposed by the external conduct standards.

Accordingly, there may be some confusion around how the external conduct standards operate in conjunction with the ACFID Code and whether compliance with the ACFID Code would be sufficient to meet the obligations in the external conduct standards. Currently, the ACNC's website provides a detailed comparison of how the ACNC's governance standards compare with the ACFID Code. The ACNC's website also states that, "*If your organisation complies with the ACFID Code of Conduct, it is highly likely it will also meet the ACNC's Governance Standards.*" A similar detailed comparison should be included on the ACNC's website that shows how the ACNC's external conduct standards compare with the ACFID Code.

Currently, the government is aiming to have the external conduct standards operational by 1 July 2019. I suggest that the ACNC ensures it has adequate time to prepare and provide the material above to all charities before commencing the Regulation, as well as allowing adequate time for the charities to implement new policies and ensure compliance with the external conduct standards. This may require the implementation date to be pushed back.

3.2 Standard 2: Annual Review of Overseas Activities and Record Keeping

This standard requires a charity to keep records of its operations and activities on a country by country basis and report this information to the ACNC annually.

This standard does not distinguish between the types and circumstances of overseas activities carried out by a charity. For example, a charity which provides time-critical emergency relief activities may not be able to retain sufficiently detailed records for the ACNC, or implement a sophisticated process, because the activity is carried out swiftly. This is in contrast with an activity which is a long-term development project, where it would be easier to conduct due diligence, implement policies and maintain records before conducting the activity. Accordingly, I suggest that the nature of the activities of the organisation is considered when deciding what is 'reasonable' for an organisation with respect to the annual review and record keeping.

The Regulation provide examples of the information that should be obtained and kept by the charity in order to comply with this standard. Although this information is helpful, it would be of greater assistance to charities if the ACNC produced a draft Annual Information Statement (AIS) with the additional questions before the implementation of the new Regulation, so that charities have a better indication of the data they will need to collect. This would be particularly helpful for organisations that currently have poor record keeping and need to implement new systems. Again, this is particularly relevant for basic religious charities.

Example (e) in the Regulation provides:

"details of any documented claims of inappropriate behaviour by the registered entity's employees or responsible entities outside Australia, and subsequent actions taken by the registered entity as a result."

This example highlights the lack of clarity around what type of information the charity will need to disclose to the ACNC. For example, does the charity only need to report to the ACNC that an incident has occurred, or will the charity be required to provide a comprehensive incident report? If it is the latter, this requirement could be an administrative burden on the charity and may require the charity to seek external legal advice, including regarding privacy requirements.

Currently, the AIS of each charity can be viewed online by the public on the ACNC website. This promotes transparency and accountability in the industry. However, with the new information that a charity may be required to disclose, this could also cause reputational loss for the charity. For example, the AIS may disclose that the charity worked with an overseas party which participated in child smuggling. This could cause reputational loss for the charity, which it may not be able to recover from. Further, the AIS may not provide the relevant context (i.e. that the charity conducted sufficient due diligence enquires in accordance with the external conduct standards beforehand). Accordingly, I suggest that information regarding the overseas

organisations with which the charity has worked, as well as information regarding 'documented incidents', is not made available to the public through the AIS.

3.3 Standard 3: Anti-Fraud and Anti-Corruption

This standard requires the charity to take reasonable steps to minimise risks of corruption, fraud, bribery or other financial impropriety by the responsible entities, employees, volunteers and third parties outside Australia, and to document any perceived or actual material conflicts of interest.

A preliminary step in minimising the risk of fraud and corruption is for a charity to conduct sufficient due diligence on the third party organisation it intends to collaborate with. This can be a timely and expensive process which may require the charity to seek expert assistance. To ensure that this process is conducted efficiently, it would be appropriate for the ACNC to provide guidance on the following:

- the areas that charities should be mindful of when conducting due diligence;
- how often the due diligence should be conducted;
- if the due diligence needs to be conducted on both the organisation and program; and
- if the overseas entity (that the charity has contracted with) outsources to another entity, do you need to conduct due diligence on that other entity.

The requirement to document actual material conflicts of interest extends to employees, volunteers, third parties and responsible entities outside Australia. Most charities will already have procedures in place to report conflicts of interest arising at a board level because of the requirement to comply with governance standard 5. However, this standard extends to employees, volunteers and third parties, and not only the board. This will be a huge undertaking for charities to educate on, as well as monitor compliance with, the standard. Charities may be required to run seminars on identification of conflicts of interests and implement new systems for recording conflicts of interests. (This will be of particular importance to basic religious charities that currently do not need to comply with governance standard 5). This will also impose a burden on larger charities that have a high turnover of employees and volunteers. The level of scrutiny, education and compliance may even deter volunteers from volunteering for charities.

Ideally, the ACNC should provide assistance to charities to ensure they can comply with this standard. Further, as we have stated regarding standard 2, we submit that further guidance is required regarding the enforcement steps that charities must take regarding third parties, and whether the obligation only applies to parties with which the charity directly contracts.

3.4 Standard 4: Protection of Vulnerable Individuals

This standard requires the registered charity to take reasonable steps to ensure the safety of vulnerable individuals outside Australia who are provided with services or benefits by the charity or through a third party.

This standard provides that a charity must "...ensure the safety of the vulnerable individuals". This essentially imposes a duty of care on the charity. It is unclear how far this duty extends and what the charity is required to do to comply with the standard. For example, an organisation may be assisting with providing education in a third world country and an employee becomes aware of a child suffering abuse from their parent. There is ambiguity as to whether it is sufficient for the employee to report this to the charity and the charity to keep a record, or whether the employee is required to report this incident to the local authorities. In some cases, the local authorities may not be of any assistance or may be corrupt, or reporting the incident could cause more damage for the child. Therefore, it would be pertinent for the ACNC to provide more guidance on situations like this in the explanatory materials for the Regulation.

I urge that the treasury consider the issues and recommendations raised in this submission when conducting its inquiry.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Vera', with a stylized, flowing script.

**VERA VISEVIC
PARTNER**

**(CO-AUTHORED WITH ALISON SADLER, LAWYER AND JOHN VAUGHAN-WILLIAMS,
LAWYER)**